

Coming back to the present case the grounds for detention are reproduced from p 21 of the appeal record as follows:

Alasan-Alasan Untuk Perintah Tahanan

Bahawa kamu, Jamaluddin bin Othman alias Yeshua Jamaluddin, sejak tahun 1985 hingga ditangkap pada 27 Oktober 1987, telah melibatkan diri dalam satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu. Kegiatan kamu itu boleh mendorong kepada timbulnya suasana ketengangan dan permusuhan di antara masyarakat Islam dengan masyarakat Kristian di negara ini dan boleh memudharatkan keselamatan negara.

The important words in that statement are 'telah melibatkan diri dalam satu rancangan untuk menyebarkan agama Kristian di kalangan orang-orang Melayu'. Or in English 'was involved in a plan or programme to propagate Christianity amongst Malays'.

The grounds become clearer when we look at the allegations of fact contained in the statement. The first allegation concerned participation in a group (in November 1985) at the First Baptist Church, Jalan Pantai, Petaling Jaya called the 'Philip Cheong's group' said to be formed for the purpose of spreading Christianity among Malays. The second, third and fifth allegations concerned participation (in 1986) in a 'khemah kerja' (work camp) and participation in a 'seminar on Islamic consultation' (in Singapore). The fourth allegation alleged that the respondent converted into Christianity six Malays.

The sum total of the grounds for the detention was therefore the supposed involvement of the respondent in a plan or programme for the dissemination of Christianity among Malays. It is to be observed that the grounds do not, however, state that any actions have been done by the respondent except participation in meetings and seminars and that the fourth allegation alleged that the respondent converted into Christianity six Malays.

We do not think that mere participation in meetings and seminars can make a person a threat to the security of the country. As regards the alleged conversion of six Malays, even if it was true, it cannot in our opinion by itself be regarded as a threat to the security of the country.

As stated by this court in *Inspector General of Police v Tan Sri Raja Khalid bin Raja Harun*³ the Act was enacted under art 149 of the Federal Constitution and it is a piece of legislation essentially to prevent and combat subversion and actions prejudicial to public order and national security.

In *Re Tan Sri Raja Khalid*³ the authority had stated that they had reason to believe that the substantial losses suffered by a bank (with deposits from members of the armed forces) caused by the manner in which loans were approved through the acts of the detainee/applicant could

evoked feelings of anger, agitation, dissatisfaction and resentment amongst members of the armed forces which in turn could lead them to resorting to violent actions and thereby affecting the security of the country. The trial judge there thought it to be incredible that losses sustained by a public bank where the depositors also included members of the public at large could result in any organized violence by the soldiers. This court was of the view that it would be naive to preclude the judge from making his own evaluation and assessment from an obvious statement of fact.

In the present case we are of the view that the grounds for the detention in this case read in the proper context are insufficient to fall within the scope of the Act. The guarantee provided by art 11 of the Constitution, ie the freedom to profess and practise one's religion, must be given effect unless the actions of a person go well beyond what can normally be regarded as professing and practising one's religion.

The appeal is accordingly dismissed.

Order accordingly.

Solicitors: *Lee, Perara & Tan*.

Reported by *Prof Ahmad Ibrahim*

F Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor v Lim Guan Eng

SUPREME COURT (KUALA LUMPUR) – CRIMINAL APPEAL
NO 61 OF 1988
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA)
AND AJAIB SINGH SCJ
30 JANUARY AND 24 FEBRUARY 1989

Constitutional Law – Habeas corpus – Application for – Whether detainee has right to be present in court – Discretion of court – Practice not to allow presence of detainee – Internal Security (Detained Persons) Rules 1960, r 93(1)

This was an appeal from the decision of the High Court reported at [1988] 3 MLJ 323. The respondent who had been detained under the Internal Security Act applied for the issue of a writ of habeas corpus. He was originally represented by counsel but subsequently the respondent discharged his solicitors. The respondent applied for an order to be issued for him to appear at the hearing of the application. The learned trial judge allowed the application and the appellants appealed.

Held, allowing the appeal:

(1) The principle is that where the issue of a writ of habeas corpus is sought it is not the practice to allow the presence of the person detained.

(2) Although the court has a discretion to secure the presence of the detainee under r 93(1) of the Internal Security (Detained Powers) Rules 1960, the discretion should only be

exercised in circumstances where the court itself requires the presence of the detainee, for instance where the court is satisfied that the detainee is a necessary witness to a criminal or civil matter before the court or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case.

(3) A detainee discharging his solicitors in order to argue his own case or that he prefers to act as his own advocate can never by itself be a sufficient reason to issue an order to produce under r 93(1) of the Internal Security (Detained Persons) Rules 1960. In this case the excuse that the respondent's counsel was unable to get adequate instructions is not easily acceptable. The facts of the case and the chronology of events clearly show that the respondent deliberately discharged his solicitors so that he could ask to be produced in person.

Cases referred to

- 1 *Minister for Home Affairs, Malaysia v Karpal Singh (No 2)* [1988] 3 MLJ 85 (folld)
- 2 *Re Greene* (1941) 57 TLR 533 (refd)

Legislation referred to

Internal Security (Detained Persons) Rules 1960 r 93(1)

Appeal from: Criminal Application No 1 of 1988 (High Court, Malacca)

Abu Talib bin Othman, Attorney General, Malaysia (*Ng Aik Guan*, Deputy Public Prosecutor, with him) for the appellant.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The history of this case has been elaborately set out in the judgment of the trial judge but briefly they are as follows. The respondent was detained under the Internal Security Act 1960 on 20 July 1988. He filed an application for habeas corpus which application was scheduled for hearing on 12 August 1988. The respondent was then represented by counsel. On 9 August 1988 the solicitors for the respondent wrote to the senior assistant registrar, High Court, Melaka requesting for the court to issue an order to produce the respondent on the date of hearing on 12 August 1988. The senior assistant registrar replied by letter dated 10 August 1988 that the judge, for reasons given in the letter, declined to issue the order requested for. On the same date, that is, 10 August 1988, the solicitors informed the senior assistant registrar that the respondent had discharged them as solicitors stating that the respondent wanted to present his case personally. The solicitors applied to the court to be discharged.

In the meantime the Attorney General's Department by letter dated 11 August 1988 sent a letter to the senior assistant registrar objecting to the request for the production of the respondent. A telegram was sent to the respondent by the senior assistant registrar requesting the respondent to provide sufficient reasons for his application for the order to produce.

On the date of the scheduled hearing, that is, 12 August 1988, a telegram was sent by the respondent to

A the senior assistant registrar confirming that he had discharged his solicitors 'with immediate effect' and requested for the issue of an order for his production in court. The learned judge informed the federal counsel in court that he was adjourning the case to enable the respondent to file a formal affidavit. On 19 August 1988 the learned judge delivered a written judgment and ordered that the respondent be produced on the subsequent date of hearing. On 22 August 1988 the Public Prosecutor appealed against that decision.

The respondent is not a lawyer although he said he is doing an external degree course in law. He was not produced before the trial judge nor at this appeal. But his affidavits were considered by the judge and form part of the appeal record and for this appeal we also have the advantage of reading his written submission.

It is obvious that the order the respondent had requested for was an order to produce under r 93(1) of the Internal Security (Detained Persons) Rules 1960 which provision reads as follows:

Whenever the presence of a detained person is required by any court of civil or criminal jurisdiction such court may issue an order addressed to the superintendent requiring production before the court of such person at the time and place to be named in such order, and the said superintendent shall cause the person named in such order to be brought up as directed, and every such court may by endorsement on such order require the person named therein to be again brought up at any time to which the matter wherein such person is required may be adjourned.

This rule was already examined by this court in *Minister for Home Affairs, Malaysia v Karpal Singh (No 2)*.¹ In that case it would seem quite clear to anyone there were many reasons which the trial judge found acceptable as to why he should require the presence of the detainee. One reason was to enable Mr Karpal Singh to argue his own case as he was an advocate and solicitor having wide experience in habeas corpus applications.

In *Karpal Singh (No 2)*'s case¹ both the trial court and the Supreme Court firmly affirmed the principle that where the issue of a writ of habeas corpus is sought, it is *not* the practice to allow the presence of the detainee. It is clear from his judgment that the trial judge in the present case was aware of both *Re Greene*² and also the Supreme Court case referred to above. He, however, considered that the circumstances of the case before him exempted him from being bound by precedent. In his opinion the respondent had sufficient reasons to discharge his solicitors. According to him the respondent fell into a category of one who was 'forced by circumstances to appear in person'.

With all due respect we are not at all persuaded by the reasoning of the trial judge. The interpretation of r 93(1) has already been settled by this court and we do not propose to go beyond what has already been said in

Minister for Home Affairs, Malaysia v Karpal Singh.¹ In delivering the judgment of this court, the Acting Lord President said:

We are of the view that r 93(1), on its proper construction, cannot be invoked to secure the presence of a detainee in any criminal or civil court notwithstanding that it is the detainee's choice to argue his own case. The rule clearly envisages that the discretion should only be exercised in circumstances where the court itself requires the presence of the detainee, for instance where the court is satisfied that a detainee is a necessary witness to a criminal or civil matter before the court, or where it would occasion a failure of justice to deny the presence of a detainee to argue his own case.

A detainee discharging his solicitors in order to argue his own case or that he prefers to act as his own advocate can never by itself be a sufficient reason to issue an order to produce under r 93(1). In this case the excuse that the respondent's counsel was unable to get adequate instructions is not easily acceptable. The facts of this case and the chronology of events clearly show that the respondent deliberately discharged his solicitors so that he could ask to be produced in person.

The order of the learned judge must accordingly be set aside.

Appeal allowed.

Order accordingly.

Reported by Prof Ahmad Ibrahim

Gula Perak Bhd v Agri-Projects (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING PETITION
NO D3-33-6-88
VC GEORGE J
30 AUGUST 1988

Civil Procedure – Petition by company to approve scheme of arrangement – Application by intervener for security for costs – Whether petitioner company should be ordered to provide security for costs – Companies Act 1965, s 351(1)

Companies and Corporations – Petitioner company seeks court order to approve scheme of arrangement – Application by intervener for security for costs – Whether petitioner company should provide security for costs – Companies Act 1965, ss 176, 351(1)

The respondent intervener in this application invokes s 351(1) of the Companies Act 1965 and seeks an order that the petitioner company provide sufficient security for costs in respect of the petition vis-à-vis the respondent intervener.

The petitioner had filed its petition on 15 February 1988 pursuant to s 176 of the Companies Act 1965 and seeks the sanction of the court in respect of a scheme of arrangement, one main feature of which is that its creditors accept some 40 cents

A in the ringgit by way of a compromise. The respondent intervener is a creditor of the petitioner to whom is owed some \$70,000. If the petitioner is successful in its petition the respondent intervener will get some \$28,000 instead of the right to the \$70,000. The total debts of the petitioner run into millions of Malaysian dollars. Apparently all the creditors save the respondent intervener support the proposed scheme.

B The first question to resolve is whether s 351(1) applies to a petitioner seeking a s 176 sanction. Counsel for the petitioner contends that the discretion should be exercised in favour of the petitioner for three main reasons:

- (i) delay
 - (a) there had been no prior demand for security for costs;
 - (b) in any event the application was not made promptly;
- C (ii) the petition is not frivolous or lodged mala fide;
- (iii) competing interests of the petitioner and the respondent intervener.

Held, allowing the respondent intervener's application in part:

(1) The rule provided by s 351 is the exception to the general rule and the burden is on the plaintiff, once it is established that it will be unable to pay costs, to satisfy the court why security for costs should not be ordered.

(2) The lack of a prior demand was inconsequential (the need for a prior demand for security for costs referred to in *Menon v Abdullah Kutty*⁷ was in a context different from a s 351 situation), and there was no inordinate delay and in any event such delay as there was should not be allowed to prejudice the respondent intervener's application for security for costs to be incurred (as opposed to such costs as had already been incurred).

(3) In the face of their valuers' report which valued lands of the petitioner at some \$7 million as opposed to the petitioner's valuation of some \$24 million for the same lands, the value of the lands is relevant in giving consideration to the scheme proposed by the petitioner and it cannot be said (and the petitioner in fact does not say) that the objections raised by the respondent intervener are frivolous or are not made bona fide.

(4) Though the court should in exercising its discretion have a predisposition towards granting the security sought, on the facts of the instant case, even applying the unfettered discretion approach taken by Lord Denning, the conclusion to be arrived at is that the petitioner should be ordered to provide security for costs.

(5) By a s 351 application, the security for costs to be provided is for costs to be incurred post-application and not for previous costs incurred. On that basis, the application is disallowed in respect of costs previously incurred and the petitioner should provide within 60 days suitable security for payment of costs up to an amount of \$150,000 only.

[Editorial Note: The petitioner has appealed to the Supreme Court vide Civil Appeal No 145 of 1988.]

Cases referred to

- I 1 *Crystal Theatres Ltd v Fuss & Johns* (1940) 57 NSWWN 107 (refd)
- 2 *Sir Lindsay Parkinson & Co Ltd v Triplan Ltd* [1973] 2 WLR 632 (refd)
- 3 *Westralian Gold Mines Ltd v Westralian Minerals & Drilling Pty Ltd* (1986) 4 ACLC 167 (refd)
- 4 *Buckley v Bennel Design & Construction Pty Ltd* (1974) 1 ACLR 301 (fold)